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2
3 UNITED STATES DISTRICT COURT
4 SOUTHERN DISTRICT OF NEW YORK
5 -----x

6 THE BRANCH OF CITIBANK, N.A.
7 ESTABLISHED IN THE REPUBLIC OF
8 ARGENTINA,

9 Petitioner,

10 v.

11 21 Civ. 6125 (VM)

12 ALEJANDRO DE NEVARES,

13 Respondent.

14 Oral Argument

15 -----x
16 New York, N.Y.
17 December 17, 2021
18 11:00 a.m.

19 Before:

20 HON. VICTOR MARRERO,

21 District Judge

22 APPEARANCES (Via Telephone)

23 PILLSBURY WINTHROP SHAW PITTMAN LLP
24 Attorneys for Petitioner
25 BY: RYAN ADELSPERGER
ROBERT L. SILLS

26 KUDMAN TRACHTEN ALOE POSNER LLP
27 Attorneys for Respondent
28 BY: GARY TRACHTEN
DAVID N. SAPONARA

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1 THE COURT: The Court entered a temporary restraining
2 order on this matter on July 31 of this year, having found that
3 Mr. De Nevares' argument that Citibank Argentina and CBNA were
4 the same entity, that that was not likely to succeed on the
5 merits.

6 The TRO restrained Mr. De Nevares from making any
7 effort to enforce against Citibank Argentina assets, the
8 judgment that Mr. De Nevares had obtained against CBNA in a
9 proceeding in Argentina.

10 The TRO, as the Court understood it, would allow
11 Mr. De Nevares to enforce the judgment against CBNA directly or
12 against Citibank Argentina in arbitration.

13 Citibank Argentina requested that the Court refer the
14 dispute to arbitration in Argentina. Mr. De Nevares' Argentine
15 counsel commenced a proceeding in the Argentina labor court to
16 collect against CBNA assets that actually, according to the
17 petitioner, according to Citibank Argentina, belong to Citibank
18 Argentina.

19 In that proceeding Mr. De Nevares' counsel sought a
20 declaration that CBNA and Citibank Argentina were not separate
21 entities for the purposes of enforcing the judgment. Mr. De
22 Nevares joined in that request and consequently Citibank
23 Argentina petitioned to have Mr. De Nevares withdraw from that
24 request for clarification on the ground that it violated the
25 terms of this Court's temporary restraining order.

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1 Based on these developments, there are a couple of
2 essential questions that the parties' submissions address in
3 part, and I will invite you to briefly elaborate on.

4 One is, does the action that Mr. De Nevares took in
5 Argentina in joining the request for clarifications in that
6 proceeding constitute a violation of the TRO and, if so, what
7 would be an appropriate remedy in this Court for such a
8 violation?

9 Would a fine for contempt of court be warranted, or is
10 any relief in this Court directing withdrawal of Mr. De
11 Nevares' request moot at this point in light of an Argentina
12 court's most recent ruling?

13 I will allow the parties in turn an initial ten
14 minutes to address these questions or other matters that they
15 feel would be vital for a resolution of the dispute at this
16 point.

17 Let's begin with the petitioner. Mr. Adelsperger?

18 MR. SILLS: Your Honor, it's Robert Sills on behalf of
19 the petitioner. Mr. Adelsperger does come ahead of me in the
20 alphabet, but with your Honor's permission, I will present the
21 petitioner's case.

22 THE COURT: Proceed.

23 MR. SILLS: Thank you, your Honor.

24 Your Honor, the questions you ask are, of course, the
25 ones that are addressed in the recent correspondence to the

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1 Court.

2 I think it's abundantly clear that this is a direct
3 violation of the TRO and that Mr. De Nevares is now seeking to
4 benefit from his contemptuous conduct. The TRO could not have
5 been clearer.6 It says at the bottom of page 2 and the top of page 3
7 of your Honor's order, The foregoing restraint includes,
8 without limitation, any effort, any effort to enforce the
9 judgment against Citibank Argentina or any of its assets based
10 on the claim that Citibank Argentina and Citibank NA are not
11 separate entities for such purposes.12 It doesn't say unless he prevails in an Argentinian
13 court. It prohibits him from making that application. It is
14 abundantly clear from the record in this case that this
15 application was made not only by Mr. De Nevares' lawyers,
16 although I think the initial argument we saw, that an
17 application by the lawyers was somehow separate from
18 application by de Nevares is, to say the least, a highly
19 questionable proposition, particularly because the restraint,
20 in accordance with Rule 65, prevents not only Mr. De Nevares,
21 but anyone acting in concert with him from attempting to
22 execute the judgment against Citibank Argentina in that way,
23 and it's hard to think of anyone who acts more in concert with
24 a restrained party than his retained counsel.

25 In any event, your Honor, it is abundantly clear from

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1 the admissions made by counsel, New York counsel for Mr. De
2 Nevares, that this was done directly on Mr. De Nevares' behalf.
3 The correspondence is attached to the papers. Interestingly
4 enough, correspondence admitting that is attached to the papers
5 submitted by Mr. De Nevares.

6 There is a claim that at one point, that seems to have
7 been abandoned, that his filing in Argentina was defensive. I
8 frankly don't know what that means, but the key piece of
9 evidence here, your Honor, is the decision of the appellate
10 court itself. After the trial court in Argentina had denied
11 the application that was filed on November 5, it was
12 transferred to an appellate tribunal, which ruled very quickly.

13 Looking at the certified translation of that order
14 supplied by Mr. De Nevares in the papers submitted to this
15 Court, the second page of that order, which is page 7 of the
16 ECF filing by Mr. De Nevares, No. 49, filed on the 15th of this
17 month, it said the plaintiff filed a motion -- in the second
18 paragraph -- for clarification with appeal in subsidy asking
19 for precisely the relief that the TRO prohibits him from asking
20 for. Paragraph IV on that same page goes on to say, For
21 methodological reasons, the appeal filed by the plaintiff on
22 11/5/21 will be dealt with first. And that paragraph concludes
23 by saying Citibank Argentina and Citibank New York were a
24 single bank. This means, however, there is a profound unity
25 under the plurality of apparently different persons varying the

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1 figure of the employer according to the branch to which the
2 plaintiff was referred to provide services, concluding that it
3 was uselessly fragmented to the detriment of Mr. De Nevares.

4 That is precisely the question that is to be addressed
5 in arbitration which your Honor found was likely to be the
6 means by which Mr. De Nevares had agreed, as indeed he had, and
7 has to resolve these disputes.

8 So I don't think there's the slightest question that
9 the record shows that Mr. De Nevares, through counsel
10 obviously, on his own behalf and not with this fanciful
11 argument that this was done by counsel on their own behalf, did
12 exactly what he was prohibited from doing and now claims to be
13 the beneficiary of this improperly obtained ruling in
14 Argentina.

15 So, to your Honor's first question, yes, this does
16 constitute a direct and blatant violation of this court's
17 order.

18 What is the appropriate remedy? He ought to be
19 compelled to withdraw his application and not to take any
20 further steps to take advantage of the improperly obtained
21 judgment, order, however characterized, that he obtained in
22 Argentina.

23 He should withdraw that application. It is his
24 application. He is the beneficiary of it. It is within his
25 power to right the wrong, and the way in which that is

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1 customarily done in civil contempt is, of course, a fine.

2 We had suggested a daily fine, but apparently the TRO
3 itself wasn't enough. He doesn't respect this Court's order,
4 and so we would suggest that, along the lines of cases like
5 *Telenor Mobile v. Storm*, that the fine be an escalating fine;
6 that he be given a few days to bring himself into compliance
7 with this Court's order. After that he should be fined.

8 We had suggested an initial fine of \$10,000 per day
9 and then after a brief period of further noncompliance, if that
10 is unfortunately the case, the fine should be doubled. And
11 after a further similar period it should be doubled again.
12 Because the whole point of a compliance fine is to make it more
13 expensive for the contemnor to defy the court's order than to
14 comply with it. And he has what appears to be a highly
15 questionable judgment for \$9.5 million against Citibank NA, not
16 against Citibank Argentina, and he should be in a position
17 where it is less expensive to comply with this Court's order
18 than to defy it.

19 I will note that this doesn't strip him of a remedy.
20 Citibank NA is right here in New York. It is without question
21 one of the most solvent entities on earth. If he wants to try
22 to collect his judgment against the entity that he sued, he's
23 got a lawyer here in New York. There is a statutory mechanism
24 for attempting to collect that judgment against Citibank, and
25 he should avail himself of that rather than trying to end run

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1 this Court's judgment in Argentina.

2 And we think that in the interim, because a litigant
3 to plays games like this -- I mean, he's trying to cut it too
4 close. Your Honor gave him some room in the TRO to collect
5 against Citibank NA in Argentina. When he discovered that
6 Citibank NA has no assets in Argentina, he reverted to his plan
7 of going after Citibank Argentina, precisely which is what was
8 prohibited.

9 On an interim basis we would suggest in addition that
10 the TRO be expanded to prohibit him from attempting to collect
11 the judgment in Argentina at all, because otherwise we are
12 going to be coming back to court every time he tries to thread
13 the needle and avoid the consequences of this Court's order.

14 The final question your Honor asked is whether or not
15 this is moot. It is not. It is within his power to fix this.
16 He still has to -- as we explained in our last letter to your
17 Honor, steps have to be taken in Argentina by Mr. De Nevares to
18 actually effectuate this judgment that he's improperly
19 obtained. It's been demanded. Judgment -- I'm sorry, the case
20 has been remanded to the trial court for the entry of what
21 Argentinian law calls I believe a writ of attachment, process
22 in execution.

23 He should certainly be prohibited from taking any
24 further steps to enforce this improperly obtained order in
25 Argentina. It is within this Court's power to do that, and it

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1 is within his power to withhold that. Any notion that he is
2 powerless to stop his own improper litigation adventure in
3 Argentina cannot possibly be right. Even if there were
4 difficulties in that, and there aren't, as Judge Lynch's
5 decision in *Telenor* makes clear, this is a problem of his own
6 making, and if there are difficulties in complying with this
7 Court's order that is not a reason to excuse him.

8 It would be inequitable to say the least to allow
9 Mr. De Nevares to profit from his own wrong and now argue in
10 effect that relief is moot because he has succeeded in
11 defeating for the moment or avoiding the Court's restraint.

12 If anything, your Honor, that calls for a stronger
13 restraint and a more coercive sanction, to make sure that he
14 will bring himself finally into compliance with the order
15 entered in July.

16 I see, your Honor, that my time has expired. If the
17 Court has any further questions, of course I'm ready to respond
18 to them.

19 Otherwise I thank the Court for its attention.

20 THE COURT: All right. Thank you.

21 Mr. Trachten?

22 MR. TRACHTEN: Thank you, your Honor.

23 THE COURT: Go ahead.

24 MR. TRACHTEN: I think in the first instance what we
25 need to focus on is that the TRO expressly excluded from its

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1 scope any effort to enforce the judgment against Citibank NA
2 directly, and this was an exclusion that was not in the TRO
3 that the petitioner had applied for but was something that your
4 Honor added into that when issuing that.

5 The other thing -- and this is where there's really
6 some obfuscation by Mr. Sills in his presentation of the
7 facts -- under Argentine law the attorneys who represented de
8 Nevares in obtaining the judgment, I'll call them Argentine
9 counsel, have direct interest in the judgment in their own
10 right and have distinct execution rights in connection with
11 those interests. Neither Citibank NA in the proceeding down in
12 Argentina nor the petitioner in this Court has contested that
13 fact.

14 Now, Argentine counsel have not entered into any
15 arbitration agreement with Citibank NA or any of its affiliated
16 entities. So the scope of Argentine counsel's enforcement
17 rights is given to the determination of the Argentine courts
18 under Argentine law.

19 Now, what happened here, I think we need to go through
20 very carefully what the proceedings were because, as you will
21 see, there was no effort, which is what the TRO said, there was
22 no effort whatsoever by de Nevares to enforce the judgment
23 against the -- at all, never mind against Citibank Argentina,
24 whatever kind of entity that may be.

25 So what happened was that Argentine counsel obtained

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1 from a trial court a liquidation, which is a calculation of the
2 amount of the judgment and the interest due on the judgment
3 which it requested in U.S. dollars. It needed to do that to
4 enforce its own rights because that calculation of the judgment
5 as a whole is what determines what its interest is.

6 Once the liquidation issued and it obtained that
7 liquidation on notice to Citibank NA, once the liquidation
8 issued Citibank, had five days under Argentine law to pay the
9 judgment. Failing that, Argentine counsel had to write to seek
10 permission to freeze the assets and obtain an order to require
11 that the assets be deposited in a judicial account.

12 That's the rule. Citibank did not pay Argentine
13 counsel the amount due them under the judgment. So Argentine
14 counsel sought permission to freeze only to the extent of their
15 own interest an account facially titled to Citibank NA in the
16 central bank directly against Citibank NA.

17 Frankly, although that is not the facts that we have
18 to deal with, we believe that Mr. De Nevares would have had an
19 equal right to seek to freeze the assets of an account titled
20 to Citibank NA in the central bank. But Mr. De Nevares did not
21 do that because we know that the petitioner is fairly
22 aggressive about these things, and he doesn't want to expend
23 legal fees even successfully fighting a matter. So he did not
24 do that.

25 Now, Citibank, through counsel, Citibank NA, not

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1 Citibank Argentina, but Citibank NA through counsel expressly
2 appearing as "in representation of Citibank NA" with its
3 address in the United States, without any appearance by the
4 so-called branch and having some kind of separate juridical
5 existence, it was they who applied to the court to block the
6 bid for permission, permission of counsel for their interest
7 claiming that the assets held in its claim -- and we've showed
8 you the documents showing that it was in its name -- were not
9 its assets and that the judgment should be in pesos. Argentine
10 counsel opposed NA's application, and the court, agreeing with
11 Argentine counsel, denied Citibank's application.

12 But the decision -- and remember this is just on
13 the -- there's no effort to get any kind of writ of attachment
14 on behalf of de Nevares. Zero effort. The decision, while
15 granting permission to freeze, it was ambiguous because it
16 referenced two different rulings. One had to do with service
17 of process, where the Court suggested that they were separate
18 entities. That was a trial court. And then the appellate
19 court decision that said for purposes of the employment they
20 were the same entity, and the Court said be aware of those
21 things.

22 So counsel applied for clarification. It was not an
23 application that they began. This was a clarification of a
24 decision made by Citibank NA, not by the branch, because the
25 branch was not a party to any of these. It did not intervene

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1 to say these are my assets. We just had a blanket statement by
2 Citibank NA that says these are not our assets.

3 What happened at the point of clarification is that
4 Argentine counsel is aware of a rule under Argentine law, a
5 procedural rule, that any order that happens in the case, you
6 may lose your right to ever challenge it if you don't make an
7 objection to it within three days.

8 So what we did, it is a matter of defense, is to make
9 sure that if the ruling would be adverse on the issue, and this
10 Court here would, as we hope it will do, dismisses the case
11 here, that Mr. De Nevares would not be barred from ever taking
12 a contrary position to that by reason of a waiver.

13 So those are the facts here. The fact is there was
14 only an effort, only by Argentine counsel for their interest to
15 enforce the judgment and only against Citibank NA directly.
16 These are the facts.

17 There was no effort by Mr. De Nevares. If he had made
18 the same efforts, it would have been within the scope of the
19 TRO. So I think that is our position, subject to any questions
20 that your Honor may have.

21 THE COURT: No questions at this point.

22 Mr. Sills, a couple of minutes to wrap up your
23 argument.

24 MR. SILLS: Thank you, your Honor.

25 We are not asking for any relief, your Honor.

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1 It is a red herring to set up the rights of Mr. De
2 Nevares lawyers in Argentina. We are not asking for relief
3 against them. We don't -- they have the rights they have. We
4 are asking for relief against Mr. De Nevares. And I think the
5 record is absolutely clear that, through counsel, as one would
6 expect, Mr. De Nevares made an application to the Argentine
7 courts for relief that is expressly prohibited by the TRO. The
8 order of the Argentine court that I read from before makes that
9 absolutely clear. It distinguishes applications by the
10 lawyers, applications by what it calls the expert translator
11 and applications by the plaintiff.

12 It says that they will first rule on the plaintiff's
13 motion for clarification. That is the application that seeks
14 to hold Citibank Argentina and Citibank NA as the same entity,
15 precisely the subject of the TRO. Nothing that is in the
16 papers that have been submitted to the Court, nothing in the
17 argument we just heard, refutes that.

18 Now, the fact that Mr. De Nevares still has to take
19 additional steps to convert the judgment he got into cash in
20 Argentina it seems to me answers the mootness question, and it
21 is conduct that is restrained and should be restrained. But
22 the notion that going to court and laying the predicate for
23 that further step is not itself after violation of the TRO
24 makes no sense.

25 It is not only a successful attempt that the restraint

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1 that your Honor entered concerns. It's any attempt. That is
2 what the restraint says. This is clearly an attempt.

3 The notion that what is conceded in correspondence
4 from counsel from Mr. De Nevares here, what is made expressly
5 clear in the Court's order, an application by Mr. De Nevares to
6 lay the predicate for going after the assets of Citibank
7 Argentina is as much a violation of the order as if he had
8 gotten an Argentine bailiff or court official to go and seize
9 those assets, because this is the necessary predicate for that.

10 It is good, I think, from the standpoint of insuring
11 compliance with the Court's order that there are steps yet to
12 be taken by Mr. De Nevares, and it should be clarified that the
13 restraint applies to those, but he shouldn't be given the
14 benefit of his improper conduct. He should be ordered to
15 withdraw the application that he made, and he should be ordered
16 to do that under threat of a coercive fine.

17 That's the remedy. He should undo the wrong he has
18 committed. I don't think there's the slightest question on the
19 face of the record here that he has done precisely that which
20 the Court prohibited.

21 THE COURT: All right. Thank you.

22 MR. TRACHTEN: May I be heard, your Honor?

23 THE COURT: Very briefly.

24 MR. TRACHTEN: Okay. If you look at that decision,
25 you will see that at 6B what it says is that the presentation

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1 for the arguments -- the appellant is right, and it is
2 appropriate to know the decision of 11/18/21 with respect to
3 the attachment decree therein by the judge in connection with
4 the expert's fees and the fees of the attorneys.

5 It was not -- the decision that was made was only --
6 was very specific to the attachment decree, and that attachment
7 is only an attachment that was sought by counsel for
8 themselves.

9 Now what Mr. Sills is suggesting is that what he wants
10 to do is have this TRO that allows them to proceed and change
11 the law and not have Mr. De Nevares be able to defend it.
12 Because if he were to withdraw this, he's at risk of never,
13 ever being able to say to or -- I guess if he withdraws it, I
14 guess he could come back on it because it is not adverse to
15 him, but the point is it was not in contempt.

16 This is, as you can see throughout, this was a
17 proceeding directly against Citibank NA, and counsel appeared
18 only for Citibank NA. It was completely within what your Honor
19 had -- the exclusion that your Honor had in the TRO. And given
20 the level of certainty of wrongdoing before one can find in
21 contempt, we just think it falls way below the bar of saying
22 that there was some contempt of the Court in doing what was
23 done here.

24 THE COURT: Thank you. I am going to close the
25 hearing at this point. I am persuaded that Mr. De Nevares'

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1 action in joining the request for clarification in Argentina
2 does violate the provisions of the TRO insofar as the TRO
3 prohibited any effort to enforce the Argentina judgment by
4 Mr. De Nevares. And in my view the predicate for the request,
5 the argument that Citibank Argentina and CBNA are the same
6 entity is precisely what the TRO did not contemplate and
7 consequently, Mr. De Nevares' joining in the request that is
8 based on that premise in my view is a violation of the terms of
9 the TRO.

10 I will direct Mr. De Nevares to cease such efforts,
11 withdraw from the application. There might be ways in which
12 under Argentina law Mr. De Nevares could make a withdrawal
13 without prejudice. I don't know that. But it appears that
14 that might be a possible way of his addressing the concern that
15 he has about his rights in Argentina.

16 Of course, there is an additional avenue here. Mr. De
17 Nevares is the subject of an arbitration agreement. There is
18 absolutely nothing that precludes Mr. De Nevares from
19 proceeding in arbitration. Citibank has already commenced such
20 a proceeding, and to the extent that Mr. De Nevares has rights
21 to challenge or to enforce the judgment, the arbitration
22 proceeding is the appropriate place to do so.

23 I am going to impose a coercive fine of \$10,000 which
24 Mr. De Nevares is directed to pay commencing four business days
25 from today. That would take us through Tuesday -- or Wednesday

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1 of next week. The fine will go into effect on that day, and
2 will increase by \$5,000 a day for every three days thereafter
3 that the Mr. De Nevares continues in violation of the TRO.

4 Is there any question concerning the coercive fine?

5 Mr. Sills?

6 MR. SILLS: Not on behalf of petitioner, your Honor.

7 THE COURT: Thank you. Mr. Trachten?

8 MR. TRACHTEN: My understanding is that he's required
9 to withdraw from that application, and that's what is at issue,
10 that that would avoid the fine?

11 THE COURT: That is correct.

12 MR. TRACHTEN: Okay. I hear you.

13 THE COURT: All right. Thank you.

14 Have a good day and a good weekend.

15 MR. TRACHTEN: Thank you, your Honor.

16 (Adjourned)

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